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In The

Supreme Court of the United States

October Term, 1991

Sabine River Authority and
Texas Water Conservation Association

Petitioners

v.

United States Department of Interior, et al.

Respondents

On Petitions for Writs of Certiorari
To the United States Court of Appeals
For the Fifth Circuit

BRIEF OF RESPONDENT, LITTLE SANDY HUNTING AND FISHING CLUB, IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether federal action in accepting a purely negative easement, which neither causes nor permits any change in the physical environment, is a major action significantly affecting the quality of the human environment, requiring the preparation of an Environmental Impact Statement.

2. Whether the FWS Preservation Program is a proposal for major federal action (rather than a general guide for future activity) of such a nature as to require an Environmental Impact Statement.

PARTIES

Although not included in the "Parties in the Court Below" section in the Sabine River Authority Petition, Little Sandy Hunting and Fishing Club, correctly listed as an "Interested Party" in the Texas Water Conservation Association Petition, was a defendant in the District Court, an appellee in the Court of Appeals, and is a respondent here. It has neither parent nor subsidiary.

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STATEMENT OF THE CASE

In 1986 Little Sandy Hunting and Fishing Club granted the United States of America a perpetual non-development negative easement

covering 2800 acres in Wood County, Texas. The only thrust of the easement was to preserve the land in the character then existing. It restricted the fee owner by prohibiting alteration of typography or vegetative cover, drainage of wetlands, any development, ranching or cattle operations, timber cutting or harvesting and unnecessary roads, trails or fences. It granted the Fish and Wildlife Service no affirmative rights. All FWS can do is come on the land and see that the restrictions are observed and conservation practices continued. There is no right granted to "use" the land for any purpose. The acceptance of the easement came after the preparation of an Environmental Assessment and the issuance of a Finding of No Significant Impact.

Sabine River Authority was concerned that its proposed Waters Bluff Reservoir, designed to meet water needs in the year 2030, could not be built, although at this stage there had been no

final decision to proceed, no license or permits obtained, and no funds were available. It nevertheless filed suit, contending that under NEPA an EIS was required in connection with the acceptance of the easement.

Texas Water Conservation Association was allowed to intervene and raised a new issue not introduced (but now adopted) by Sabine River Authority, namely that FWS's Concept Plan, pertaining to future acquisition of wildlife refuge sites, was major federal action requiring an EIS.

REASONS FOR DENYING THE PETITIONS

There is no express contention that there is conflict between the decision below of the Fifth Circuit and a decision of another United States Court of Appeals, nor that the court below has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of this Court's power of supervision.

Furthermore, the decision below is clearly correct in that it tracks leading decisions of this Court, namely:

1) Metropolitan Edison v. People against Nuclear Energy, 460 U.S. 766 (1983), in holding that federal action having no effect on the physical environment requires no EIS; and

2) Lujan v. National Wildlife Federation, 497 U.S. -- 110 S. Ct. 3177, 111 L.Ed.2d 695 (1990), in holding that Bureau of Land Management's land withdrawal review program did not require an EIS.

ARGUMENT[1]

I. THE ACCEPTANCE OF THE LITTLE SANDY EASEMENT DID NOT REQUIRE THE PREPARATION OF AN EIS

The question at the heart of this case is whether the acceptance of the Little Sandy easement was " . . . major Federal action significantly affecting the quality of the human environment . . . "

Aside from whether the action was "major" or "significant," did it affect the human environment? It gave FWS no affirmative rights to do anything; it put serious restrictions on Little Sandy. The FWS goal was to maintain everything, as far as it possibly could, as it existed -- change nothing.

Could such an easement "significantly affect the quality of the human environment?" That depends on what Congress meant by "human

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[1]Since both Petitions present the same two issues, they will be addressed jointly in this brief.

environment." How expansive is that concept? The Supreme Court in Metropolitan Edison v. People Against Nuclear Energy, 460 U.S. 766, came to grips with this question and gave a clear answer. It said:

> "If we were to seize the word "environment" out of its context and give it the broadest possible definition, the words "adverse environmental effects" might embrace virtually any consequences of a governmental action that someone thought "adverse." But we think the context of the statute shows that Congress was talking about the physical environment -- the world around us, so to speak. NEPA was designed to promote the human welfare by alerting governmental actors to the effect of their proposed actions on the physical environment." 460 U.S. at p. 772.

and again:

> "Thus, although NEPA states its goals in sweeping terms of human health and welfare, these goals are ends that Congress has chosen to pursue by means of protecting the physical environment, 460 U.S. at p. 773, (emphasis by the Court)."

So, does the acceptance of this easement, that is designed to continue in perpetuity the character of this land, within the framework of

the easement provisions, adversely affect the physical environment? To ask the question is to answer it. So far as FWS is concerned, there will be no changes whatsoever in the environment. The land and waters conserved by the easement will continue, peaceful, serene, and undisturbed, as they have for decades. Even as to the fee owner, Little Sandy, there are serious restrictions on what it can do that might alter the condition or use of the land. And there is no change of any nature because none of the prohibited uses is going on now. In no way does the granting of the easement produce, cause, or result in a change or invasion of the environment. Literally, nothing happens or comes to pass as a consequence of the easement. The threshold requirement of a primary impact on the physical environment is missing.

The Authority and Texas Water Conservation Association (TWCA) have recognized, as they must, that an adverse effect upon the physical

environment is necessary to generate a requirement for an EIS, but they immediately shift the talk to human environment and decry the consequences that will ensue if a scarcity of water develops (meaning Waters Bluff is not built) and the economy and the people suffer from the scarcity of water.

But how is not building a reservoir an adverse effect upon the physical environment? It may be something else -- it may have other consequences, but it is not a physical change in the environment.

There is no doubt as to what Congress had in mind. Two principal sponsors of NEPA explained:

> "What is involved [in NEPA] is a congressional declaration that we do not intend, as a government or as a people, to initiate actions which endanger the continued existence or the health of mankind: that we will not intentionally initiate actions which do irreparable damage to the air, land and water which support life on earth." 115 Cong Rec 40416 (remarks of Sen. Jackson) (emphasis supplied).

> "[W]e can now move forward to preserve and enhance our air, aquatic, and terrestrial environments . . . to carry out the policies and goals set forth in the bill to provide each citizen of this great country a healthful environment." Id. at 40924 (remarks of Rep. Dingell) (emphasis supplied).

". . . irreparable damage to air, land, and water . . . " How is the air -- or the land -- or water -- damaged by the acceptance of the easement?

Petitioners recognize that they must deal with Metropolitan Edison and manfully attempt to do so, but they constantly encounter the problem of identifying the change in physical environment, resulting from federal action, that is necessary. No matter how they twist and turn, they cannot avoid the fact that Congress, in enacting NEPA, chose to protect the human environment by monitoring the effects of changes in the physical environment.

What Petitioners seek is a different statute -- an enhanced NEPA -- a statute that Congress could have enacted but did not -- a

statute that says that any federal action that may have an effect on the human environment (even though no effect on the physical environment) requires an EIS.

Petitioners say the courts below preferred "preservation actions" to water supply. These courts did nothing of the sort. They merely followed the clear decision of this Court -- to involve NEPA, federal action must change or lead to a change in the physical environment.

It is a one-two-three analysis -- First, a federal action that, secondly, changes the physical environment, producing, thirdly, an effect on the human environment that should be evaluated.

Here the second criterion is missing. There is simply no effect on the physical environment from the acceptance of the easement.

It is this second essential that Petitioners ignore or glide over.

To give just one example -- the Authority says in its Petition (page 11):

> "The ruling below wholly excludes from NEPA, preservation actions which themselves cause no immediate changes in the physical environment. This is so, even where such actions preclude human intervention necessary to protect other important environmental interests -- such as, in this case, a plentiful clean water supply for human consumption."

The Authority sets forth the first criterion -- federal action, jumps over the "no change" requirement, and emphasizes the adverse effect on human health and welfare.

Suppose, for instance, that FWS had owned the land in question, in fee simple, from time immemorial, and the Authority sought to buy the land to build Waters Bluff/Reservoir. Would FWS have to prepare an EIS in order to decline to sell? Obviously not, yet such action would have all the dire consequences that the Petitioners say will result from acceptance of the easement. On the other hand, if FWS decided to sell to allow the building of the lake, it probably would have to prepare an EIS, to evaluate the consequences. One of the judges commented on this point in the course of the Argument before

the Fifth Circuit panel and the Court in its opinion stated:

> "Of course, when the government conveys property to, or exchanges land with, a private party that plans to develop the land, an EIS is necessary because the conveyance of property is precipitating a change in the physical complexion of the land." (SRA Appendix A, p.21a) (emphasis by the Court).

The Authority attempts to support its position by invoking the "risk" section in Metropolitan Edison. It points to the situations where leases, licenses, etc. from the federal government become subject to NEPA because they create a "risk" that subsequent action may damage the physical environment. Exactly so. Such licenses, etc. lead to constructing dams, building airports, dredging wetlands, etc. The one-two-three step is satisfied: federal action -- environmental change -- damage to air, land, or water (the human environment). That can never happen in the instant case. There can be no "risk" of

later action affecting adversely the environment because the easement permits no action.

In deciding this case, the District Court went into an extensive review of the record which had been compiled in this case. The Fifth Circuit on appeal, because the case had been decided on summary judgment motions, reviewed the record (SRA Appendix A, pp. 18a-19a) and affirmed. Now Petitioners, presenting an Appendix D of 154 pages of affidavits, interrogatory excerpts and letters ask this Court to conduct a third review of factual matter. We urge the Court to decline this request.

II. THE FWS PRESERVATION PROGRAM DOES NOT RISE TO THE STATURE OF MAJOR FEDERAL ACTION REQUIRING AN EIS

The record in this respect is very extensive and complex. Petitioners point to certain circumstances as indicating the development of plans, analysis of alternatives, and establishment of goals to such a degree as to culminate in a proposal for action that would

require NEPA review. They ignore the fact the Plan was a preliminary study, which refused to specify sites to acquire, and left open a wide avenue of approaches to accomplish its goal of preserving bottomland habitat. It refers to the infancy of the program and the future preparation of a detailed preservation plan.

Furthermore, the very nature of the Program assumes that acquisition of conservation easements and titles will not lead to changes in the environment and thus involve NEPA. TWCA in its brief (p. 19) refers to the Program as ". . . a program of Federal acquisition for perpetual nondevelopment of water resource areas . . ." (emphasis supplied).

Finally, we deal here with a situation where the district judge has carefully reviewed the extensive record and concluded that ". . . the Court finds the Preservation Program is not a 'proposal' for major federal action under NEPA." (SRA Appendix A, p. 50a).

The Court of Appeals has affirmed, saying:

"the district court correctly dismissed the claims brought by the Sabine River Authority and the Texas Water Conservation Association and we are hard-pressed to improve upon its scholarly work." (SRA Appendix A, p. 3a).

The holding below on the factual analysis of the situation brings us within the ambit of this Court's recent opinion in Lujan v. National Wildlife Federation, 497 U.S. ____. There the question was whether a land withdrawal review program was "agency action" within the meaning of the Act. The court said (111 L.Ed.2d at p. 717):

"It is impossible that the affidavits would suffice, as the Court of Appeals held, to enable respondent to challenge the entirety of petitioners' so-called "land withdrawal review program." This is not an "agency action" within the meaning of §702, much less a "final agency action" within the meaning of §704. The term "land withdrawal review program" (which as far as we know is not derived from any authoritative text) does not refer to a single BLM order or regulation, or even to a completed universe of particular BLM orders and regulations. It is simply the name by which petitioners have occasionally referred to the continuing (and thus constantly

> changing) operations of the BLM in reviewing withdrawal revocation applications and the classifications of public lands and developing land use plans as required by the FLPMA. It is no more an identifiable "agency action" -- much less a "final agency action" -- than a "weapons procurement program" of the Department of Defense or a "drug interdiction program" of the Drug Enforcement Administration. As the District Court explained, the "land withdrawal review program" extends to, currently at least, "1250 or so individual classification terminations and withdrawal revocations. 699 F.Supp., at 332."

In brief, the Program is not ripe for NEPA-EIS consideration. Again, we urge the Court to decline the opportunity to examine a factually complex record, already fully reviewed below.

CONCLUSION

For the reasons stated, we urge denial of the Petitions.

Respectfully submitted,

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